

U.S. Department of Labor

Office of Administrative Law Judges  
800 K Street, NW, Suite 400-N  
Washington, D.C. 20001-8002

(202) 693-7300  
(202) 693-7365 (FAX)

Issue Date: 21 October 2003



.....  
*In the Matter of*

ANGEL NEGRON,  
Complainant,  
v.

Case No.: 2003-AIR-00010

VIEQUES AIR LINK,  
Respondent.  
.....

**DECISION AND ORDER**

This matter arises under the employee protection provision of Section 519 of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century, 49 U.S.C. § 42121 ("AIR 21" or "the Act"), as implemented by 29 C.F.R. Part 1979 (March 21, 2003). This statutory provision prohibits an air carrier, or contractor or subcontractor of an air carrier, from discharging or otherwise discriminating against any employee with respect to compensation, terms, conditions, or privileges of employment because the employee provided to his employer or Federal Government information relating to any violation or alleged violation of any order, regulation, or standard of the Federal Aviation Administration ("FAA") or any other provision of Federal law relating to air carrier safety. 49 U.S.C. § 42121(a).

A hearing in this matter commenced on May 19, 2003, and concluded on May 21, 2003, in San Juan, Puerto Rico. The decision in this matter is based on the testimony at the hearing and the exhibits admitted at the hearing.<sup>1</sup> A number of the exhibits submitted during the hearing were written in Spanish. The record was left open post-hearing for the parties to submit translated copies. Complainant submitted copies of its exhibits translated from Spanish to English on June 5, 2003. *Cx. 4, Cx. 14, and Cx. 17*. Respondent submitted copies of its exhibits translated from Spanish to English on August 1, 2003. *Rx. 1, Rx. 2, Rx. 4, Rx. 6, Rx. 8, and Rx. 9*.

---

<sup>1</sup>The testimony is referenced herein as "*Tr.*" and the page of the transcript in which the testimony appears. The evidence admitted into the record includes the Administrative Law Judge exhibit (*ALJx 1*), the Complainant's exhibits (*Cx. 1-35*), and Respondent's exhibits (*Rx. 1-12*).

### ***A. Procedural History and Case Background***

Complainant is Angel Negron. He was employed by Respondent, Vieques Air Link, as an airplane pilot. Complainant was hired in May 2001, and promoted to captain upon completion of flight training provided by Respondent. *Tr. 182; 394*. The Employment Contract between Complainant and Respondent states that on July 26, 2001, Complainant began working as a pilot for Respondent. *Rx.6; Tr. 400*. Complainant's base was in Fajardo, Puerto Rico. He flew an "island hopping" route around Puerto Rico, making approximately 12 to 14 flights per day. *Tr. 187*.

At the time Complainant was promoted to captain he obtained a commercial license. The commercial license enabled Complainant to fly "on-demand" flights. "On-demand" flights are designated as flights that fly when the demand for that flight arises. Whereas, to fly a prescheduled flight, a pilot must have an airline transport pilot (ATP) license. *Tr. 395 - 97*.

A pilot in command of an on-demand flight is directly responsible and the final authority for that airplane. The pilot in command assumes responsibility for the safety of the aircraft cargo, crew members, and passengers once he signs the flight manifest. *Tr. 189, 364*. A flight manifest is a document which lists the date and time, aircraft number, pilot, the destination, whether the flight is on-demand or prescheduled, passengers, and flight crew. *Tr. 193*. The flight manifest also ensures that the total combined weight is below the maximum weight capacity for that plane by requiring a listing of the weight of the plane, the air fuel, the passengers, the cargo, and the carry-on baggage. *Tr. 20-21*. Before the plane departs the pilot must approve the manifest. *Tr. 56*.

Respondent's operation is governed by Part 135 of the FAA Regulations, which requires the airline to weigh the passengers. Airlines governed by Section 121 of the FAA Regulations do not need to take the actual weight of the passengers because those airlines are allowed to calculate an average for the total weight of the passengers. *Tr. 363*.

On May 7, 2002, Complainant filed a complaint with the Occupational Safety and Health Administration, U.S. Department of Labor, alleging that Respondent had discriminated against him in violation of Section 42121 of the Act. *ALJx 1*. On November 25, 2002 the Regional Administrator for OSHA issued a Findings and Preliminary Order finding that Respondent had violated the Act's employee protection provision and ordering Respondent to immediately reinstate Complainant to his former position and work location with all the pay, benefits, and rights he had before his June 4, 2002 discharge of employment. *ALJx 1*. On December 30, 2002, Respondent objected to the findings and requested an administrative hearing pursuant to 49 U.S.C. § 42121(b)(2)(A). A Notice of Hearing dated January 23, 2003 was issued, and a hearing date was scheduled for May 19 - 21, 2003.

### ***B. Issues***

1. Whether Respondent committed adverse action(s) against Complainant in response to protected activity under the AIR21 Act.

2. What damages and remedies, if any, Complainant is entitled to as a result of the actions taken by Respondent.

### ***C. Findings of Fact***

On January 28, 2002, Complainant saw a manifest for an airplane flight where Francisco Cruz, Respondent's Director of Operations, was a passenger. Complainant noticed that the weight listed on the manifest for Cruz was 240 pounds, which Complainant thought was too low and was manipulated to fit the weight balance of the airplane. *Tr. 191, 192.* Because of his suspicion, Complainant kept a copy of the flight manifest. He subsequently sent a letter dated March 23, 2002, to the FAA reporting that Cruz lied about his weight on this flight manifest. *Tr. 415; Cx. 18. Tr. 193; Cx. 7.* Complainant later piloted a flight on April 10, 2002, with Cruz as a passenger. His weight was reported on the manifest for that flight as 286 pound. *Tr. 196; Cx. 8.* Cruz' explained the difference in weight by testifying that he gained weight, his weight increased from 240 pounds on January 28, 2002 to 286 pounds on April 10, 2002. *Tr. 474-75.*

Johnny W. Ramos-Melendez was the supervisor of the airport counter at Isla Grande Airport, in San Juan, Puerto Rico on February 20, 2002.<sup>2</sup> *Tr. 54.* Ramos testified that he was asking each passenger their weight, and putting their stated weight on the manifest of a flight to be piloted by Complainant. When Complainant received the manifest, he complained to Ramos that some of the passenger's weights did not appear consistent with the weights listed in the manifest, and the plane was overweight. *Tr. 57.* One of the passengers decided against taking the flight because of a strong wind. Ramos told Complainant that the manifest would be a lot better since the passenger decided to leave. *Tr. 56, 57.* Ramos and Complainant made a new manifest with a new weight and balance (*Cx. 9*), and the Complainant proceeded with the flight. *Tr. 57.*

Later the same day Ramos became aware that he did not have a copy of the reconstructed manifest, but he did have a copy of the original manifest. He noticed that it had been altered with a handwritten note, signed by Complainant, stating, "Weights were verified with passengers and airplane is overweight." *Tr. 57. Cx. 1.* Also, the weights listed for four passengers on the original manifest had a line drawn through their originally written weight and a heavier weight was written next to the original amount. *Cx. 1.* Ramos was displeased that Complainant had altered a document upon which he had already signed his name. *Tr. 63.*

Complainant testified that on February 21, 2002, he received a telephone call from Cruz instructing him to stop clarifying the passenger weight manifest because the practice was causing friction with company employees. The telephone conversation included a disagreement over the

---

<sup>2</sup>As a supervisor, Ramos was in charge of two employees. *Tr. 54.* One employee would work at the ramp dealing with luggage and packages, and the other employee attended to the passengers, doing the ticketing and preparing the weight and balance manifest for the aircraft. *Tr. 54-55.* Ramos testified at the hearing in compliance with the subpoena issued for his appearance, at the request of Complainant. *Cx. 3.*

instructions in the Respondent's Operations Manual about this procedure. *Tr. 200-01.*

Complainant got into another argument with Cruz the next day because, according to Complainant, Cruz was upset that Complainant was delaying the schedule by taking the plane to maintenance. Complainant testified that he took the plane to maintenance because it needed oil, and after he returned from his lunch break to continue his run, his airplane was still in maintenance because the maintenance personnel had not checked the plane yet. *Tr. 201.* He informed Cruz that he would not fly a plane in the unsafe condition of having low oil. *Tr. 202.*

Complainant telephoned the principal operation inspector for the FAA, José Gueits, on February 25, 2002 to report what had transpired between himself and Cruz. *Tr. 202, 420.*<sup>3</sup> Complainant followed up with a letter to Gueits, dated February 25, 2002 and date-stamped by the FAA on March 4, 2002. *Cx. 10, Tr. 419.* The purpose of this letter was to document the February 25, 2002 conversation between Complainant and Gueits and to report safety irregularities Complainant perceived were ongoing with Respondent. *Tr. 207.* Complainant believed that Gueits was going to call Respondent as a result of their conversation, but has no knowledge of whether such a call was made. *Tr. 419.*

Subsequently, on February 25, 2002, Cruz issued a memo to all of Respondent's counter agents, which stated:

For the purpose of flight manifest and weight balance, only actual weight of passenger, baggage, and cargo will be used as stated in Operations Manual Section X, Page 3. Any counter agent who does not abide by this rule is subject to disciplinary action.

*Rx. 3.* Cruz testified that his February 25, 2002 memorandum was prompted by a complaint that Ramos was altering the weights of passengers to accommodate the weight and balance of the manifest he was preparing. *Tr. 451.* Cruz added that when he found this out, he reprimanded Ramos verbally. *Tr. 451.* Cruz testified that the term "actual weight" that was used in his memo meant that the counter agent should ask the passenger for his weight, and if the counter agent doubted that weight then the passenger should be put on the scale to be weighed. *Tr. 452.* Cruz testified that the operations manual was revised on May 6, 2002, to make it a mandatory procedure that each passenger be actually weighed rather than asked their weight first. *Tr. 448, 450.*

On March 1, 2002, yet another argument ensued between Complaint and Ramos while

---

<sup>3</sup>Complainant served the FAA with a subpoena *duces tecum* to appear at the hearing. *Cx. 34.* The subpoena was originally directed to Gueits, but later amended to name the FAA in general. *Cx. 34.* The FAA responded to the subpoena, via facsimile addressed to Complainant's counsel on May 19, 2003, and stated that the FAA could not respond to the subpoena at that time because, *inter alia*, the procedural requirements of 49 C.F.R. Part 9 had not been complied with. *Cx. 34.*

Ramos was working as a counter agent. Complainant testified that Ramos became upset with Complainant because he started verifying the passenger weights that Ramos had listed on a manifest, and started asking the passengers to step up to the scale. Complainant testified that Ramos was aggressive, and physically blocked Complainant from getting near the scale and computer so that Complainant could correct the manifest. *Tr. 208-09*. Ramos corroborated Complainant's testimony. He testified that he physically blocked Complainant so that he could not pass him. *Tr. 66, 92*. Ramos also called Complainant an obscene name. *Tr. 87-88*.

Ramos stated in an incident report that during the argument Complainant's demeanor was "angry and out of control." *Rx. 2*. Complainant was "shouting" that he was going to call the FAA and the police. However, Ramos later testified that during the incident, Complainant did not yell. *Tr. 73*. On cross-examination Ramos addressed these inconsistent statements by explaining that Complainant was calling out for the police in a loud tone of voice, but not in an exaggerated tone of voice. *Tr. 94*. Ramos testified that there were passengers in the waiting area, which was about fifteen feet away, while this argument was going on, but that the passengers did not intervene because they would not have seen anything out of the ordinary. *Tr. 73*. During this incident Complainant called the police from his cell phone. After some time the police arrived. *Tr. 66*. The police issued a summons to the men, to appear at the police station on March 15, 2002, to determine whether there were grounds to file charges.<sup>4</sup> *Cx. 14; Tr. 66, 217-18*. Also, during the disagreement Ramos called Cruz, from the counter phone, and told him about the incident. *Tr. 63, 66*. Cruz asked to speak with Complainant, but Complainant did not take the phone to talk to Cruz. *Tr. 63, 424*. Cruz told Ramos to have another pilot make the flight that Complainant was scheduled to make since Complainant would not be able to fly at that time and under those circumstances. *Tr. 457*. Cruz instructed Ramos to tell Complainant that he was relieved from his functions for that day because of his refusal to talk to him. *Tr. 114*.

Cruz understood that the argument between Ramos and Complainant arose over whether the manifest correctly listed the passengers' weights. *Tr. 458*. He decided to have another pilot fly Complainant's flight because he believed Complainant to be upset, and he did not want a pilot flying in a stressful or upset condition. *Tr. 458*. Cruz testified that he understood that Complainant was busy and could not take the phone at that time, and that later Complainant called him to explain the incident. *Tr. 459*. Cruz testified that he was satisfied with the explanation, but told Complainant that he was suspended nevertheless for the two days remaining in his shift. *Tr. 462*. Complainant asked Cruz to put the suspension in writing. *Tr. 462*.

Cruz issued a memo on March 1, 2002, to Complainant, which stated:

Due to incident occurring at Isla Grande on March 1, 2002, where you and the counter agent argue about the flight in presence of our passengers, Vieques Air Link request that for the sake of safety, you take the rest of your shift off and call the office

---

<sup>4</sup>At the police station the men resolved their disagreement, and Complainant drafted an apology letter for Ramos to sign, which Ramos signed. *Tr. 67; Rx. 1; Cx. 4*.

on March 5, 2002 for consultation.

*Cx. 11.* Cruz testified that the two-day suspension was because the argument took place in front of the passengers and such an encounter causes passengers to be weary of getting on an airplane.<sup>5</sup> *Tr. 461.*

Complainant responded to Cruz's memo on March 1, 2002, by a letter addressed to Cruz, explaining his version of the incident with Ramos and his perception of the incorrect weight tabulation on the manifest. *Cx. 5; Cx. 12.* Complainant hand-delivered the letter to the Chief Pilot, Jimmy Adams. Adams' initials appear on the bottom of the copy of the letter Complainant retained. *Tr. 214; Cx. 12.* Complainant submitted a copy of this letter to the FAA. *Tr. 213, 215; Cx. 13.* The letter is date-stamped by the FAA on March 4, 2002 at 10:55 a.m. *Cx. 13.*

A few days after the March 1, 2002 incident, Cruz asked Ramos to make a report of the incident, and suggested that a copy be sent to the FAA. *Tr. 68, 110; Rx. 2*<sup>6</sup>. Ramos testified that Cruz told him that both men would be suspended because of the incident, but Ramos would be paid during his suspension while Complainant's suspension would be unpaid.<sup>7</sup> *Tr. 68.* Ramos testified that Cruz told him that a pilot like Complainant was no good for the company because he was "too strict" in his work and would be removed from the company.<sup>8</sup> *Tr. 69.* Cruz denied making this statement to Ramos, and testified that at no time did he consider getting rid of Complainant. *Tr. 482.*

Ramos was suspended for five days. *Tr. 99-100.* Cruz testified that Ramos' suspension was for both the confrontation and altering the manifest. *Tr. 465.* He also testified that the suspension did not commence until some days after the March 1, 2002 incident, rather than immediately as in the case of Complainant's suspension because the responsibility of a pilot is greater than that of a counter agent, and Cruz felt that Complainant should not be flying a plane while upset from a confrontation.

---

<sup>5</sup>The President of Vieques Air Link testified that he did not participate in the decision to suspend Complainant; that the decision was made by Cruz. *Tr. 141-42.*

<sup>6</sup>*Rx. 2* is a two-page typed document, titled "Report of Occurrence with Captain Angel Negron." The statement is signed by Ramos and dated March 5, 2002. *Rx. 2.* Ramos testified that he does not know how to type or write in a computer, and this document was typed by a secretary in Cruz's Office based on the information Ramos provided to Cruz. *Tr. 109-10.*

<sup>7</sup>Ramos testified that his suspension was later converted to unpaid status by Respondent's Vice President, Mrs. Guadalupe, when she found out about the arrangement because she did not agree with it. *Tr. 69.*

<sup>8</sup>Ramos testified as to an example of what Cruz meant by the term "too strict." *Tr. 70.* Ramos explained that when a plane needed maintenance, most pilots would make their flight and then take the plane to maintenance, but Complainant would take the aircraft to maintenance first before making the flight and that was not convenient for the company. *Tr. 70.*

*Tr. 464.*

On March 5, 2002, Complainant was summoned to appear at a meeting at Respondent's office in Vieques on the next day. On the advice of his lawyer Complainant brought a witness to the meeting, Maria Ortiz, the aunt of his wife. However, Ortiz, was refused entry to the meeting because she was not associated with the company. Complainant attended the meeting without her. *Tr. 220.* Present at the meeting for Respondent was Cruz, Adams (the Chief Pilot), Blanca Guadalupe (the Vice-President), and Carmen Bingham (the Chief Pilot's wife). *Tr. 219-20.* At the meeting, Complainant presented his version of the events that took place between himself and Ramos on March 1, 2002. *Tr. 220.* Complainant subsequently left the meeting to let his supervisors deliberate. When he was called back in, they informed him that he could return to work. *Tr. 220.* Cruz presented to Complainant a letter dated March 6, 2002, stating that Complainant could return to his normal work schedule. The letter also stated that, "[d]iscussions and disagreements with flight operations should be discussed in private not in the presence of our flying public." *Cx. 15.*

Complainant responded to the Cruz letter with a letter of his own, dated March 14, 2002, and faxed on March 20, 2002. *Tr. 225-26; Cx. 16.* The letter disagreed with the level of discipline taken by Respondent, and requested payment for the two days Complainant was suspended. *Tr. 228.* The letter argued that Complainant was only following regulations on March 1, 2002, and it informed Cruz that Complainant was filing a report with the FAA regarding this incident and other irregularities at Vieques Air Link. *Tr. 228; Cx. 16.*

On March 19, 2002, the President of Vieques Air Link, Osvaldo Gonzalez, called a meeting between management and the pilots. *Tr. 118.* Gonzalez testified that the meeting was called because he understood Complainant had some complaints about the company, and he wanted to give Complainant and the other pilots the opportunity to air them. *Tr. 148.* Present at the meeting were most of the pilots (including Complainant) and Respondent's three management personal: Gonzalez (President), Cruz (Director of Operations), and Jimmy Adams (Chief Pilot). *Tr. 23, 119.* Complainant spoke out at the meeting, and addressed a number of issues, including safety concerns. *Tr. 271.* He offered recommendations for the company, for which Gonzalez publicly offered his congratulations. *Tr. 120-21.* Complainant also offered criticism about the ability of management to administer the company and the amount of their salary. *Tr. 121, 272-74.* Apparently, the criticism upset Gonzalez, who testified that he found these comments to be disrespectful. *Tr. 121.* However, Complainant was not made aware of Gonzalez' displeasure until March 22, 2002, when he was socked with a 15 day suspension purportedly in response to those remarks. *Tr. 274.* Miguel Garcia, another pilot present at the meeting, testified that Complainant was very polite during the meeting with regard to what he said.<sup>9</sup> *Tr. 23; 157; 274.*

On March 22, 2002 the FAA visited Respondent for an inspection. *Tr. 274; 517.* Later that evening Complainant received a call from Adams informing him that a letter was waiting for him from

---

<sup>9</sup>Garcia appeared at the hearing under a subpoena served on him by the Complainant. *Cx. 2.* Garcia is a pilot for Respondent, and has been a pilot for Respondent since 1986. *Tr. 10.*

the Respondent. *Tr. 274.* The letter advised Complainant that he was suspended for fifteen days without pay as a disciplinary action for two incidents: 1) the argument Complainant was involved in with Ramos on March 1, 2002; and 2) his conduct during the meeting on March 19, 2002. *Rx. 4.* Gonzalez testified that Complainant's suspension was not because he brought safety concerns about possible overweight aircrafts to the attention of the company but was the result of the incidents on March 1, 2002 and March 19, 2002. *Tr. 124.* He also testified that although Complainant is a good pilot, he has no respect for the management of the company. *Tr. 124.*

Gonzalez' March 22, 2002 letter to Complainant acknowledges that Complainant had already been suspended for two days over the March 1, 2002 incident. *Rx. 4.* Gonzalez testified that he was aware that he was disciplining Complainant a second time for the same incident. *Tr. 149.* He did not consider Complainant's side; his decision was based on a report he received from Cruz about the March 1, 2002 incident. Nor did he see the letter Complainant sent to Cruz on March 1, 2002 (*Cx. 5*), describing the incident which transpired that day. *Tr. 153.*

Complainant responded to his fifteen-day suspension by a letter to Gonzalez on March 23, 2002. *Cx. 17.* Complainant's letter detailed his version of the events which led up to his suspension, and references his participation with the FAA inspection on March 22, 2002. *Cx. 17.* Gonzalez testified that he received this letter and considered it, but it did not cause him to reconsider his decision to discipline Complainant. *Tr. 158.* Complainant sent a second letter to the FAA on March 23, 2002; in this letter he reported that Cruz falsified his weight on a flight manifest, which resulted in the airplane being illegally overloaded. *Tr. 415; Cx. 18.*

On April 3, 2002, Cruz issued a memo to respondent's employees stating that an FAA inspection was conducted and several discrepancies were found. *Rx. 7.* The memo listed six corrective actions to take place:

1. Correct and complete passengers' name.
2. Correct amounts of fuel as expressed by the pilot in command and passengers actual weight by use of Company scale.
3. All carry-on baggage must be weighed with the passenger and not relocated in the baggage compartments.
4. All passengers must be seated as per flight manifest. NO EXCEPTIONS.
5. Only manifested passengers will be boarded.
6. Alert for Haz-MAT. hidden in baggage. Any employee who does not abide by these rules and are found violating the FAR's are subject to disciplinary action which could be termination of employment.

Complainant was reinstated after his fifteen-day suspension. *Tr. 285.* On April 9, 2002, there was a meeting at the Respondent's headquarters with Jose Gueits, the inspector from the FAA. Most of the pilots were in attendance. *Tr. 285.* The purpose of the meeting was a conference for retraining Respondent's employees on weight and balance procedures, and to address general regulations. *Tr. 285.*



On April 17, 2002, Complainant found a letter from Cruz attached to his paycheck. The letter stated that on a flight piloted by Complainant on April 10, 2002 Complainant failed to conduct the required passenger briefing in both English and Spanish, and that he failed to verify the manifest for that flight. The letter warned that if such continued to occur, Respondent would have no choice but to take disciplinary action. *Tr. 287; Cx. 19.* Complainant protests that he did conduct the briefing in both languages and that he did sign the manifest for the flight. *Tr. 288, 290.* Complainant responded to Cruz' letter the next day by a letter of his own denying Cruz's allegations and by identifying a problem with the Respondent's policy for handling its manifests. *Tr. 288, 291-92; Cx. 20.*

Complainant testified that Cruz began to constantly interview the passengers that flew on Complainant's flights when he landed in Vieques. Complainant believes that his flights were the only flights where this interviewing was done. *Tr. 293.* On April 29, 2002, Complainant wrote a letter to Cruz maintaining that this practice was harassment, and objecting to the interviewing of his passengers. *Tr. 293-94; Cx. 21.* Complainant also mentioned in his letter that the FAA inspector had verbally commended him on reporting irregularities to Respondent. *Cx. 21.*

Complainant wrote another letter to the Administrator of the FAA on April 29, 2002, to encourage the FAA to initiate an investigation about overloading planes, the March 1, 2002 incident, his suspension, and Cruz' non-compliance with FAA regulations regarding weights listed on manifests. *Tr. 296-97; Cx. 22.*

About one week later, on May 6, 2002, Respondent transferred Complainant's home base from Fajardo on the mainland to the island of Vieques. The transfer was to be effective within thirty days. *Rx. 8.* Complainant learned of the transfer when he was handed a memo informing him of it by Adams. Complainant's initial reaction was to inquire of Adams how he was supposed to get to Vieques from his home on the mainland. Adams had no response to the inquiry. *Tr.301-02.*

The record is unclear about who made the decision to transfer Complainant. Adams and Gonzalez testified that Complainant was transferred because there was a damaged plane in the fleet, and a plane had to be transferred to Vieques. *Tr. 125, 379.* According to Adams, the decision was made by himself, Cruz and Gonzalez. *Tr. 365.* However, Gonzalez testified that he did not participate in the decision over which pilot to assign to the transferred plane, that the decision to assign Complainant to the transferred plane was made by Cruz. *Tr. 167.* Gonzalez did offer that Complainant's concerns for overweight aircrafts did not motivate the company's decision to transfer the aircraft from Fajardo to Vieques. *Tr. 134.*

Gonzalez was aware that Complainant lived on mainland Puerto Rico, in Fajardo, with his wife, and that his wife had just given birth to their second child. *Tr.166-67.* He testified that he discussed with Cruz the issue of whether a pilot already living in Vieques should be assigned to the new route, but it was decided that the decision to transfer Complainant to Vieques should be made based on seniority among the pilots. *Tr. 168.* All of the pilots already living in Vieques had more seniority than Complainant. *Tr. 168.* Adams authored two letters to the Complainant regarding the

transfer but neither letter mentioned seniority as the reason for his transfer. *Tr. 365, 366.*

Complainant responded to his ordered transfer by a letter dated May 11, 2002, to Adams. The letter asked Adams what his intentions were in light of the fact that he could not report to Vieques by 6:00 a.m. from his home on the mainland. Complainant wrote another letter to Adams on June 3, 2002, to request transportation to Vieques from the Fajardo Airport, and to notify Respondent that he would report to the Fajardo Airport at 5:30 a.m.. *Tr. 309; Cx. 24.* On June 4, 2002, Complainant arrived at Fajardo Airport at 5:30 a.m., in his uniform and with the required gear, and waited all day for instructions regarding transportation. *Tr. 310.* No one employed by Respondent gave him any kind of instruction or even talked to him during the whole day. *Tr. 313.* Later the same day, Cruz wrote Complainant, and reprimanded him for not reporting to the Vieques Airport at 6:00 a.m. *Cx. 25.* The letter informed Complainant that if he did not report to Vieques Airport at 6:00 a.m. on June 5, 2002, Respondent would consider him as having abandoned his employment as of June 4, 2002. *Cx. 25; Tr. 490-91.*

Complainant responded to Cruz' letter on June 4, 2002. He wrote that he tried to get to Vieques from Fajardo but that he was not able to, and that he again would show up at the Fajardo Airport at 5:30 a.m. the next day with the intent of getting to Vieques by 6:00 a.m. in order to comply with the transfer. Complainant wrote again to Cruz on June 5, 2002, to affirm that he still considered himself an employee of Respondent and was waiting for orders where to report. Complainant also stated that he felt discriminated against by Respondent. *Cx. 27.*

Cruz responded by letter the same day. He denied any responsibility by Respondent to assist Complainant in finding transportation to Vieques Airport in the morning. The letter repeated that if Complainant failed to be at Vieques Airport at 6:00 the next morning then he would be considered as abandoning his post. "If you are not present June 6, 2002 at Vieques Airport at 6:00 a.m., we will interpret your failure to attend your job as an abandonment of duties and a voluntary resignation." *Cx. 28.* This letter was hand-delivered to Complainant by a pilot flying in from Vieques, and given to Complainant while he was waiting in the Fajardo Airport for instructions. *Tr. 319.* Complainant had arrived at the Fajardo Airport at 5:30 a.m. *Tr. 320.*

Complainant answered on June 6, 2002. He pleaded that he was not abandoning his employment but that he could not afford to pay rent to stay over in Vieques because he already pays rent for his family to live on the mainland. *Cx. 29.* Complainant's salary was \$330.75 a week. *Tr. 344; Cx 33.*

Cruz notified Complainant by letter dated June 13, 2002, that since he did not report to the Vieques Airport at 6:00 a.m. on June 6, 2002, Respondent considered his job to be abandoned and that he would be replaced. *Cx. 30; Tr. 498-99.* Respondent hired a new pilot to replace Complainant. *Tr. 133, 499.* The transferred flight, which was assigned to Complainant, is still operating on that new route. *Tr. 134.*

On May 31, 2002, Complainant received a letter from the FAA, which thanked him for his

letters describing safety irregularities at Vieques Air Link, and stated that his concerns prompted an investigation. *Tr. 306; Cx. 23*. The letter from the FAA also stated that their investigation revealed that Complainant had raised valid concerns, and Vieques Air Link adopted new policies and procedures to correct those problems. *Tr. 306-07; Cx. 23*.

On May 7, 2002, Complainant filed a complaint with the Department of Labor, alleging that Respondent had discriminated against him for engaging in protected activity in violation of AIR21. *ALJx 1*. Gonzalez testified that he is aware that Complainant filed a complaint with the Department of Labor, but he does not remember if he was aware of the filing fact while Complainant was still employed by Respondent. *Tr. 166*. The Department of Labor wrote Respondent in a letter addressed to Cruz and dated May 8, 2002, notifying Respondent that Complainant had filed a whistleblower complaint. *Rx. 12*.

#### ***D. Applicable Law***

The employee protection provision of the AIR21 Act provides generally that no air carrier may discharge any employee or otherwise discriminate against any employee with respect to the employee's compensation, terms, conditions, or privileges of employment because the employee provided, caused to be provided, or is about to provide (with any knowledge of the employer) or cause to be provided to the air carrier or contractor or subcontractor of an air carrier or the Federal Government, information relating to any violation or alleged violation of any order, regulation, or standard of the Federal Aviation Administration or any other provision of Federal law relating to air carrier safety under subtitle VII of title 49 of the United States Code or under any other law of the United States. *See 29 C.F.R. § 1979.102(a), (b) (2003)*.

To show entitlement to damages under the Act the Complainant must show (1) that he engaged in protected activity as defined by the Act, (2) that the Respondent knew that the Complainant engaged in protected activity, (3) that he suffered an adverse employment action, and (4) that the protected activity was a contributory factor in the adverse action. *29 C.F.R. § 1979.104(b)*.

#### ***E. Conclusions of Law***

##### ***I. Complainant's Protected Activity and Respondent's Knowledge of Same***

###### ***a. Internal Safety Complaints***

Complainant sent letters to Respondent's management on four occasions relating irregularities of airline carrier safety. *Cx. 5 and 12; Cx. 16; Cx. 17; Cx. 20*. Respondent does not contest the receipt of any of these four letters. Each of these letters shows that Respondent knew of Complainant's protected activity, i.e., making informal complaints regarding airline safety to Respondent.

Additionally, Respondent's knowledge of protected activity was conceded by Gonzalez, the President of Vieques, who testified that he called the March 19, 2002 meeting between the pilots and management because Complainant had made the complaints. *Tr. 146, 148*. Also, Adams, Respondent's Chief Pilot, and Cruz, Respondent's Director of Operations testified that at this March 19, 2002 meeting, Complainant spoke out about Respondent's safety policies and changes that needed to be made to improve safety and training. *Tr. 238, 469*. These complaints of safety by Complainant at the meeting constitute protective activity.

Complainant also brought safety violations stemming from problems with establishing passengers' weight to the attention of Cruz during a telephone conversation on February 21, 2002, and he warned Cruz during a conversation on February 25, 2002 that Ramos was improperly altering passenger weights on manifests *Tr. 200-01, 458*. Cruz testified that Complainant called him to explain that the March 1, 2002 disagreement between himself and Ramos arose because Ramos had inaccurately reported passenger weights on the manifest. *Tr. 458*. These notifications of safety problems by Complainant to management are protected activity as they constitute notifications to an air carrier of violations Federal Law relating to air carrier safety.

*b. Formal Complaints to the FAA*

Complainant also sent four letters to the FAA reporting unsafe procedures by Respondent. *Cx. 10; Cx. 13; Cx. 18; Cx. 22*. Copies of these letters were not sent to Respondent. *Tr. 415-16*. However, Complainant made Respondent aware that he was filing complaints with the FAA and that he had already been in contact with the FAA about safety concerns in two letters that he addressed to Respondent. *Cx. 16; Cx. 21*. Gonzalez testified that he was aware that as a result of Complainant's complaint to the FAA, an investigator from the FAA visited Respondent for an investigation.<sup>10</sup> *Tr. 165*. Complainant's direct contact with the FAA regarding perceived safety irregularities committed by Respondent, is protected activity under the AIR21 Act.

*c. Whether Complainant's Complaints Were Objectively Reasonable*

The Complainant's safety complaints resulted from what Complainant believed to be violations of FAA regulations. Complainant testified that the concerns he had been raising to management (e.g., irregularities regarding reported fuel weight, passenger weight, and people not listed on the manifest while being onboard the plane) were the same irregularities that the FAA found during their inspection on March 22, 2002. *Tr. 274*. Adams testified that the FAA investigated Respondent and that the violations that were found by the FAA were some of the same violations that Complainant had raised to management. *Tr. 367*. Most significant is the letter Complainant received from the FAA thanking him for his letters concerning safety irregularities at Vieques Air Link, and

---

<sup>10</sup>Gonzalez testified that he did not remember when this investigation took place. *Tr. 165-66*. Complainant testified that the investigation took place on March 22, 2002. *Tr. 274*. The memo issued by Cruz, relaying that an investigation by the FAA took place, is dated April 3, 2002. *Rx. 7*.

stating that his concerns prompted an investigation which revealed that Complainant had raised valid concerns, and prompted Respondent to adopt new policies and procedures to correct those problems. *Tr. 306-07; Cx. 23*. Hence, the record establishes that Complainant's safety concerns were objectively reasonable.

## II. Adverse Employment Action

Complainant must next demonstrate, by a preponderance of the evidence, that Respondent's actions had an adverse impact on his employment. 29 C.F.R. § 1979.102(b) defines discrimination or adverse employment action very broadly. "It is a violation of the Act for any air carrier or contractor or subcontractor of an air carrier to intimidate, threaten, restrain, coerce, blacklist, discharge or in any other manner discriminate against any employee because the employee has [engaged in protected activity]".

### a. Suspensions

It is uncontested that Complainant was suspended, without pay, twice by Respondent. The first of these suspensions occurred on March 1, 2001. The suspension was for two days and resulted in two days of lost wages. *Tr. 215; Cx. 11*. The second suspension, occurring on March 22, 2002, was a fifteen-day suspension without pay. *Rx. 4*. Complainant regularly worked four days during the week. *Tr. 329*. Thus, Complainant is deemed to have missed eight days of pay due to this suspension. Therefore, these two suspensions equate to two separate adverse employment actions, which resulted in a total of ten days of pay withheld from Complainant.

### b. Transfer

Complainant alleges that Respondent's decision to transfer the starting point of his daily route is an adverse employment action. *Tr. 302*. Complainant was notified on May 6, 2002, that his home base was being transferred from the mainland of Puerto Rico, where he lived with his wife and two children including a new born, to the island of Vieques, effective June 4, 2002. *Rx. 8. Tr. 302-03*. Complainant testified that it was impossible for him to comply with the transfer because he did not have transportation to the island of Vieques, as he did not possess a boat or a plane, and there is no public transportation between Vieques and the mainland. *Tr. 301*. Complainant told management in a June 5, 2002 letter that he could not afford to pay for travel and room and board while working in Vieques and pay rent for his family's house on the mainland. *Cx. 29; Tr. 321-22*. Respondent was paying Complainant only \$330.75 a week. *Tr. 344; Cx. 33*. Complainant was not offered any additional allowances for lodging or transportation in conjunction with his transfer to Vieques. *Tr. 304*.

Transfers or reassignments involving "only minor changes in working conditions" usually do not equate to adverse employment actions. *Marrero v. Goya of Puerto Rico, Inc.*, 304 F.3d 7, 23 (1st Cir. 2002), *citing Jones v. Fitzgerald*, 285 F.3d 705, 714 (8th Cir.2002); *Crady v. Liberty Nat'l Bank and Trust Co.*, 993 F.2d 132, 136 (7th Cir.1993). However, a transfer to a less desirable

position has been held to be an adverse employment action, even though no loss in salary is involved. *Nathaniel, supra*, slip op. at 13-14 and n.13. See also *Deford*, 700 F.2d at 287; *Larry v. Detroit Edison Co.*, 1986-ERA-00032 (Sec'y June 28, 1991).

Respondent was aware that Complainant lived in on the mainland with his family, and that his wife had just given birth to a new baby. *Tr.* 166-67. Respondent was surely aware that Complainant's transfer to Vieques would impose significant costs that he would be unable to bear. *Cx.* 28. Thus, the transfer is deemed to be an adverse employment action.

Complainant contends that his transfer to Vieques constitutes a constructive discharge because it was impossible for him to comply therewith, and therefore the transfer was an attempt to force him to resign. *Tr.* 302, 332. A constructive discharge may be established where "the new working conditions would have been so difficult or unpleasant that a reasonable person in the employee's shoes would have felt compelled to resign." *Pedro-Cos v. Contreras*, 976 F.2d 83, 85 (1st Cir. 1992). The Secretary of Labor held that:

"Constructive" discharge assumes that a complainant was not formally discharged, the issue being whether she was forced to resign or whether she quit voluntarily. A finding of constructive discharge requires proving that working conditions were rendered so difficult, unpleasant, unattractive, or unsafe that a reasonable person would have felt compelled to resign, i.e., that the resignation was involuntary. *Johnson v. Old Dominion Security*, Case Nos. 86-CAA-3, *et seq.*, Sec. Dec., May 29, 1991, slip op. at 19-22 and n.11.

*Nathaniel, supra*. See also *Chertkova v. Connecticut Gen. Life Ins.*, 92 F.3d 81, 89 (2d Cir.1996) ( "Constructive discharge of an employee occurs when an employer, rather than directly discharging an individual, intentionally creates an intolerable work atmosphere that forces an employee to quit involuntarily."). Hence, in order to qualify as a constructive discharge, Complainant must establish that he was forced to quit, rather than having abandoned his employment and resigned, as alleged by Respondent.

On June 13, 2002, Respondent informed Complainant that he would no longer be considered an employee for reason that he had abandoned his position when he did not show up for work at the Vieques Airport. *Cx.* 30. However, Complainant did what he possibly could to comply with the transfer in light of his inability to get to the island of Vieques to begin his duties at the Vieques Airport by 6:00 a.m. *Tr.* 301. Complainant brought this point to the attention of management when he was notified of the decision and he conveyed to Respondent in several letters that he wanted to comply with reassignment and requested transportation. *Tr.* 301. *Cx.* 24, *Cx.* 26, *Cx.* 27, *Cx.* 29. He notified Respondent that he would report to the Fajardo Airport at 5:30 a.m. *Tr.* 309; *Cx.* 24. He arrived at Fajardo Airport at 5:30 a.m. on June 4, 2002, in his uniform and with the required gear, and waited all day for instructions regarding transportation. *Tr.* 310. No one employed by Respondent talked to him, gave him any instructions or, in fact, gave him the time of day. *Tr.* 313.

Complainant fought as best he could to keep his job. He wrote to Cruz on June 4, 2002 advising him that he tried to get to Vieques from Fajardo but that he was not able to, and that he again would show up at the Fajardo Airport at 5:30 a.m. the next day with the intent of getting to Vieques by 6:00 a.m. to comply with the transfer. Complainant's letter read in part:

...as you well know, I have been living in San Juan with my wife and my two child (sic), for the last four years. I have not abandoned my employment with Vieques Air Link, furthermore, I am trying to comply with the last recent and furious orders to be at Vieques at 6:00 A.M., for my first flight every day of work. I am doing my best to do so. For that reason, I will be again, tomorrow, Wednesday, at Fajardo Airport, at 5:30 A.M. and I hope that Vieques Air Link provides me the mean (sic) to be at Vieques at 6:00 A.M., for my first flight.

Cx. 26. Complainant wrote again to Cruz on June 5, 2002, to avow that he still considered himself an employee of Respondent and was waiting for orders where to report. Also, the June 5, 2002 letter stated that Complainant felt discriminated against by Respondent. Cx. 27.

Respondent's response was a letter by Cruz denying that Respondent had any responsibility to assist Complainant in finding transportation to Vieques Airport, and coldly informing Complainant that if he failed to be at Vieques Airport at 6:00 the next morning he would be considered as abandoning his post. "If you are not present June 6, 2002 at Vieques Airport at 6:00 a.m., we will interpret your failure to attend your job as an abandonment of duties and a voluntary resignation." Cx. 28

Given Respondent's knowledge of the hardship its decision to transfer Complainant would have on him, the impossibility for Complainant to comply with the transfer without incurring significant costs and Respondent's refusal to provide transportation or relocation assistance, Respondent's June 13, 2002 letter, which notified Complainant that Respondent considered his position abandoned, constitutes a constructive discharge. Therefore, the Complainant has established that the decision to transfer him to Vieques is an adverse employment action in the form of a constructive discharge.

### III. Protected Activity as a Contributing Factor in Adverse Employment Action

Complainant must establish, by a preponderance of the evidence, that Respondent's protected activity was a contributing factor to the adverse employment action. 29 C.F.R. § 1979.104(b). To establish the connection between protected activity and adverse employment action, the complaint may be based on circumstantial evidence of discriminatory intent. *See Frady v. Tennessee Valley Authority*, 1992-ERA-00019 and 34 (Sec'y Oct. 23, 1995); *Mackowiak v. University Nuclear Systems, Inc.*, 735 F.2d 1159, 1162 (9th Cir. 1984), *quoting Ellis Fischel State Cancer Hospital v. Marshall*, 629 F.2d 563, 566 (8th Cir. 1980). Where the decision to transfer a complainant closely follows his protected activity, an inference of causation is raised. *See Scerbo v. Consolidated Edison Co. of New York, Inc.*, 1989-CAA-2 (Sec'y Nov. 13, 1992).

### 1. The March 1, 2002 Suspension

On March 1, 2002, Complainant was involved in an argument with a coworker over whether weights were listed correctly on a manifest. *Tr.* 208. Cruz subsequently suspended Complainant for two days due to the circumstances surrounding this argument. *Tr.* 462. The record shows that Cruz knew that the March 1, 2002 argument was about Complainant's insistence on verifying passenger weight on the manifest. *Tr.* 458. Because Complainant's protected activity was immediately followed by Cruz' decision to suspend Complainant, Complainant is entitled to an inference that Respondent's knowledge of Complainant's protected activity contributed to the decision to suspend him for two days.

The Respondent may rebut this showing by producing evidence that the adverse action was motivated by a legitimate, nondiscriminatory reason. The Respondent, however, bears only a burden of production of rebuttal evidence; the ultimate burden of persuasion of the existence of retaliatory discrimination rests with the Complainant. Hence, the Complainant must establish that the reason proffered by the employer is not the true reason. The Complainant may persuade directly by showing that the unlawful reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is not credible. *Shusterman v. Ebasco Servs., Inc.*, 87-ERA-27 (Sec'y Jan. 6, 1992); *Larry v. Detroit Edison Co.*, 86-ERA- 32 (Sec'y June 28, 1991); *Dartey v. Zack Co.*, 80- ERA-2 (Sec'y Apr. 25, 1983).

Respondent answers that the reason for Complainant's two day suspension was because his argument with Ramos took place in front of passengers. *Tr.* 461. However, there was no management personnel present during the incident between Ramos and Complainant. Cruz based his decision to suspend Complainant on the description of the situation by Ramos, while conceding that he knew the incident was about whether Ramos was altering manifests and causing planes to be overweight. *Tr.* 424, 525. Further, according to Ramos, the argument was out of the range of the passengers who would not have seen anything out of the ordinary. *Tr.* 73. Cruz admits that he was satisfied with Complainant's explanation for this incident, and he concedes that he knew this was Ramos' third incident for violating the FAA policies concerning improperly listing weights on a manifest. *Tr.* 525.

Respondent's motive for suspending Complainant is shown to be pretextual. Respondent's contention that it suspended Complainant for arguing in front of passengers is not rational considering the cause of the argument, that is, Ramos' attempt to alter the weight manifest. Complainant explained to Cruz that he was attempting to comply with the safety regulations requiring an accurate manifest, but Ramos reacted by intimidating him by swearing at him and physically blocking him. *Tr.* 208-09, 421. *Cx.* 5. Particularly irrational was Complainant being disciplined more harshly than Ramos. Respondent waited until later to suspend Ramos, and initially the suspension was with pay. The suspension was later converted to unpaid status for five days by Mrs. Guadalupe, the Vice President of the Company, because she did not agree with the decision. *Tr.* 68-69, 464. Cruz agreed that it is possible that he was lenient with Ramos. *Tr.* 517. His explanation was that he felt that the responsibility of a pilot is greater than that of a counter agent. *Tr.* 464. But that explanation ignores



the cause of the argument. The only plausible explanation for Respondent's disparate treatment of these two employees is that Respondent was unhappy with the Complainant raising the issue with Ramos of the erroneous manifest. Cruz testified that although Ramos' practice of exceeding the gross weight maximum was unapproved, it did benefit the Respondent economically by allowing more passengers to fit on the plane. *Tr. 512*

Additionally, Ramos testified that Cruz told him that the reason for Complainant's punishment was that Complainant was "too strict" in his work and the company should get rid of him. *Tr. 69*. Cruz denies making this statement. *Tr. 482-83*. Ramos's testimony is found to be credible, as his overall demeanor as a witness merits credibility. Whereas, Cruz's denial is found to be self-serving, since Cruz provided a different explanation for the severity of the Complainant's suspension, and that explanation was found to be implausible. Hence, Ramos' testimony provides corroborative evidence that Cruz's decision to suspend Complainant was motivated by Complainant's protected activity of disagreeing with the stated weight amounts on the manifest and attempting to verify those weights. Therefore, Ramos' testimony also supports the finding that Respondent's knowledge of Complainant's protected activity on March 1, 2002, was a contributing factor to the adverse employment action taken on the same day.

The Complainant has shown by the preponderance of the evidence that his suspension for two days on March 1, 2002 was a consequence of his complaining to Ramos that Ramos was providing to him a manifest that listed passengers' weights as lower than they actually were.

## 2. The March 22, 2002 Suspension

Complainant was suspended on March 22, 2002, for fifteen days. *Rx. 4*. According to Cruz the suspension was ordered by Gonzalez. *Tr. 472-73*. If Respondent's asserted reason for the March 1, 2002 suspension, the argument with Ramos, sounds illogical, Respondent's reasons for the March 22, 2002 fifteen-day suspension screams of implausibility. Gonzalez testified that the fifteen-day suspension was to punish Complainant a second time for the March 1, 2002 incident, and to punish him for his criticism of management during the March 19, 2002 meeting. *Tr. 149*.

Respondent never explained why the March 1 incident demanded a second suspension. As to the March 19, 2002 meeting, it was called by Gonzalez for the purpose of giving Complainant and the other pilots the opportunity to air their complaints. *Tr. 148*. Complainant did speak and addressed a number of issues, some concerning safety problems and some critical of management, but that was the purpose of the meeting. *Tr. 271*. He did express criticism about the ability of the management personnel to administrate the company, and the amount of their salary. However, Complainant was not made aware of any displeasure by Gonzalez with his remarks until he was socked with the suspension. *Tr. 274*. In fact, Gonzalez publicly congratulated Complainant for his comments. How harsh Complainant's criticism's were, is open to question. Miguel Garcia, another pilot present at the meeting, testified that Complainant was very polite during the meeting with regard to what he said. *Tr. 120-21, 272-74*. Complainant depicted his remarks as criticizing the budget and arguing the analogy that the body of the company was strong and had the resources to work but was

being given incorrect commands by the head management. He testified that he meant no disrespect to anyone. *Tr.* 272, 274.

The reasons for the suspensions are found to be pretextual. First, there is no explanation offered on why Respondent would punish Complainant for the same incident twice. Even Cruz had to admit that Complainant's fifteen-day suspension would be too harsh if compared to the punishment that Ramos had received. *Tr.* 516. Second, it does not make sense that Gonzalez would punish Complainant for comments he made at the March 19, 2002 meeting when the purpose of the meeting was to encourage the pilots to present such complaints. Also, it is implausible that Gonzales would praise Complainant at the meeting for his comments about airline safety concerns but then three days later notify him that he was suspended in part because of his remarks at the meeting.

Complainant received the fifteen day suspension two days after he faxed a letter to Cruz on March 20, 2002, stating that he was going to file a complaint with the FAA, and on the same day that the FAA conducted an inspection in response to the Complainant's complaint. *Cx.* 16. The occurrence of the suspension so soon after the complaint to the FAA raises an inference that the suspension was a consequence of the complaint. Gonzalez argues that the suspension could not have resulted from Complainant's complaint to the FAA because when he issued the suspension letter to Complainant on March 22, 2002, he was not aware that the Complainant had filed a complaint with the FAA. *Tr.* 145. However, Gonzalez' testimony with regard to when he became aware of the Complainant's complaint with the FAA is not credible. Cruz acknowledged that he received Complainant's letter on March 20, 2002, and he was aware at that time that Complainant was bringing a complaint to the FAA. *Tr.* 524. Moreover, it is not believable that the FAA would conduct the March 22, 2002 investigation of this airline without the knowledge of the owner and president. In fact, on cross-examination, Gonzalez admitted that when the FAA investigator came, he met with him. *Tr.* 165. Nevertheless, he maintained that he does not remember when the investigation took place because he has met with this investigator so many times. *Tr.* 165. Gonzalez also testified on cross-examination that he is not sure of when he came to know that Complainant had complained to the FAA. *Tr.* 166. Gonzalez's selective memory is disingenuous; it defies credibility that he was not aware that an FAA investigation took place on March 22, 2002, and that the investigation stemmed from Complainant's complaints to the FAA.

Respondent's proffered explanation that it suspended Complainant for fifteen days because he needed further punishment for yelling in front of passengers on March 1, 2002, and because he made disrespectful comments about how the management ran the company is not believable. Complainant has established that the fifteen-day suspension was more likely motivated by Complainant's complaint to the FAA.

### 3. June 4, 2002 Transfer to Vieques

Respondent notified Complainant on May 6, 2002, that his home base was being transferred from Fajardo Airport to Vieques Airport. *Rx.* 8. This notification of transfer occurred shortly after Complainant had engaged in a number of contacts with the FAA complaining about safety problems

with Respondent. The contacts included letters to Cruz on March 14, 2002, stating that he was filing an incident report with the FAA requesting an investigation of safety violations and to Gonzalez on March 23, 2002, stating that he had reported illegal practices of weight changing on manifests to Gueits of the FAA. *Cx. 16,17*. Also, Complainant wrote Cruz on April 29, 2002, mentioning that the FAA inspector had praised Complainant at the April 9, 2002 company meeting between the FAA and Respondent's employees for bringing safety irregularities to the FAA's attention and invited other pilots to use Complainant as an example. *Cx. 21*. Cruz testified that he was aware that Complainant's safety complaints to the FAA resulted in an investigation. *Tr. 165*. Therefore, Complainant is entitled to an inference that Respondent's transfer of him to Vieques, and the resulting constructive discharge, was in response to his complaints to the FAA.

Respondent argues that it had a legitimate business reason for transferring the home base of one of its airplanes to Vieques Airport.<sup>11</sup> *Tr. 125*. However, the decision to transfer the airplane route is not at issue. Instead, the issue is whether Respondent's staffing decision, which was to assign Complainant to be the pilot for the new early morning route out of Vieques, was motivated by a legitimate business reason.

There were other pilots living in Vieques at the time, and Gonzalez and Cruz discussed staffing the new route with a pilot already living there. *Tr. 167-68*. However, according to Gonzalez, the Complainant was chosen because the other pilots residing in Vieques had more seniority than Complainant. *Tr. 168*. Adams testified that there were three or four other pilots living in Vieques at the time Complainant was transferred, but they were flying their own routes.<sup>12</sup>

The explanation offered by the Respondent, that the decision was based on seniority, is not credible. Complainant was never told by Respondent that his transfer was based on seniority. There was no mention of seniority from the time that Complainant was notified of his transfer, on May 9, 2002, through the time Respondent notified him that he was going to be replaced, on June 13, 2002. *Tr. 365-66; Rx. 8; Rx. 11; Cx. 25; Cx. 28; Cx. 30*. The first time Respondent asserted seniority as the basis for its decision to transfer Complainant, was at the hearing.

Respondent's scheduling of Complainant was arbitrary. Respondent could have accommodated Complainant's domicile on the mainland by merely allowing him to pilot one of the flights that left Vieques at 7:00 a.m. rather than insisting that he arrive at Vieques in time for the first flight out at 6:00 a.m. *Tr. 246*. Adams testified that in 2002, not all of the pilots who made those

---

<sup>11</sup>Gonzalez testified that there was a damaged airplane in Respondent's fleet, necessitating a transfer of a plane to Vieques. *Tr. 125*. Adams testified that the transfer of routes was necessary because a plane in the fleet was sold and another plane was undergoing extensive maintenance. *Tr. 243*.

<sup>12</sup>Complainant testified that there were six pilots living in Vieques at the time of his transfer. *Tr. 303*.

early morning flights out of Vieques Airport lived on the island of Vieques. Some of those pilots lived on the mainland, and they flew planes out of Fajardo to report to Vieques. *Tr.* 369. The first planes left Fajardo at 6:15 a.m. and arrived in Vieques at 6:45 a.m. and the first morning flights leaving Vieques were at 6:30 a.m. and 7:00 a.m. *Tr.* 368, 381. There could also be additional flights leaving Vieques on any given morning according to Adams. He testified that there might be three additional flights leaving at 6:30 a.m. and five additional flights leaving at 7:00 a.m. depending on passenger demand and available airplanes. *Tr.* 368-69. The only plausible explanation for Respondent's decision to schedule Complainant to such an early morning flight was to preclude him from taking an early morning flight from Fajardo to Vieques in time to make his assigned flight.

Gonzalez contends that Complainant could not contest a transfer because his Employment Application reads that Complainant would accept a transfer anywhere, and his Contract of Employment for probationary period states that he will accept a location assignment anywhere the company requires. *Tr.* 129, 160; *Rx.* 5. There are some questions over whether these documents were operable at the time of the Complainant's transfer as Gonzalez acknowledges that the application reads that it remains current for only thirty days and the Contract of Employment for the probationary period that began on July 26, 2001 and ended after 90 days. *Tr.* 161; *Rx.* 6. Nevertheless, even assuming that the Employment Application and the Contract of Employment were still operable, they do not explain why Complainant was chosen, rather than another employee of Respondent, to pilot the new route based in Vieques.

It is determined that Complainant's safety complaints to management and to the FAA more likely motivated the Respondent to transfer his home base as Respondent's proffered explanation of seniority is not found to be credible. *Shusterman v. Ebasco Servs., Inc.*, 87-ERA-27 (Sec'y Jan. 6, 1992); *Larry v. Detroit Edison Co.*, 86-ERA-32 (Sec'y June 28, 1991); *Dartey v. Zack Co.*, 80-ERA-2 (Sec'y Apr. 25, 1983).

## ***F. Remedies***

29 C.F.R. §1979.109(b) provides:

If the administrative law judge concludes that the party charged has violated the law, the order shall direct the party charged to take appropriate affirmative action to abate the violation, including, where appropriate, reinstatement of the complainant to that person's former position, together with the compensation (including back pay), terms, conditions, and privileges of that employment, and compensatory damages. At the request of the complainant, the administrative law judge shall assess against the named person all costs and expenses (including attorneys' and expert witness fees) reasonably incurred.

### **I. Back Pay**

Complainant seeks back pay for his two suspensions and for the time he was unemployed. *Tr.* 341-42. Complainant testified that his rate of pay was approximately \$8.15 or \$8.25 per hour. *Tr.* 328. He was paid on an hourly basis for twelve hours of work a day for four days a week.<sup>13</sup> *Tr.* 328-29. Complainant earned \$330.75 for a four-day work week. *Tr.* 344; *Cx.* 33. Therefore, Complainant is entitled to back pay for the ten days that he was suspended in the amount of \$826.88.<sup>14</sup>

Complainant testified that he stopped receiving wages from Respondent on June 4, 2002. *Tr.* 326. Complainant obtained a new job with the Transportation Security Administration (TSA) on September 15, 2002. *Tr.* 329. Back pay is offset by interim earnings. *Sprague v. American Nuclear Resources, Inc.*, 1992-ERA-00037 (Sec'y Dec. 1, 1994). Complainant works for TSA full time and his salary at TSA is \$11.67 per hour, which is higher than his previous salary with Respondent. *Tr.* 331. Therefore, Complainant is entitled to back wages for the period of June 4, 2002, through September 15, 2002, when he obtained a new position of regular employment. This time period equates to fourteen weeks, which entitles Complainant to back pay in the amount of \$4,630.50.<sup>15</sup>

Also, during the period of June 4, 2002 through September 15, 2002, Complainant worked on a sporadic basis for Tol-Air, MBD Corporation, at San Juan International Airport as a co-pilot. *Tr.* 330. However, Complainant also worked at Tol-Air while he worked for Respondent. *Tr.* 404. The position with Tol-Air was on a need only basis, and he would earn \$50 per day. *Tr.* 330. He worked for Tol-Air from zero to two times a week. *Tr.* 331. However, Respondent did not establish in the record how much money Complainant garnered from his employment relationship with Tol-Air. *Tr.* 409. Furthermore Complainant's back pay does not have to be offset because he was already working for Tol-Air on a sporadic basis before he was discriminated against by Respondent.<sup>16</sup>

## II. Out of Pocket Expenses

---

<sup>13</sup>Complainant testified that he worked forty-eight hours a week, but was paid for working forty hours per week. *Tr.* 329. Complainant seeks back wages based on a forty-eight hour work week. *Tr.* 344. However, Complainant is not entitled to back wages under the AIR21 Act for a payment of wages that he was not actually earning at the time of the adverse employment action, despite that he was actually working these hours.

<sup>14</sup> $\$826.88 = 2 \text{ four-day work weeks} [330.75 \times 2] + 2 \text{ days of wages } 2 \times [330.75 / 4].$

<sup>15</sup> $\$4,630.50 = 14 \times \$330.75.$

<sup>16</sup>In *Sprague, supra*, the Secretary held that there is no offset for interim earnings for positions a Complainant would have been able to hold even if the Respondent had not discriminated against him. (evidence showed that the Complainant could have done "odds and ends" jobs because of the periodic work schedule of the position held with the Respondent; employees worked for several weeks, followed by several weeks of lay off)

Complainant testified that he had to pay for his medical insurance for three months after he stopped working for Respondent, and he seeks reimbursement for these amounts. *Tr.* 333. In *Creekmore v. ABB Power Systems Energy Services, Inc.*, 1993-ERA-00024 (Dep. Sec'y Feb. 14, 1996), the Deputy Secretary indicated that health, pension and other related benefits are terms, conditions and privileges of employment to which a successful complainant is entitled from the date of a discriminatory layoff until reinstatement or declination, and these compensable damages include medical expenses incurred because of termination of medical benefits, including premiums for family medical coverage. *Creekmore, supra*. Complainant had to pay \$298.93 per month, for three months to Respondent for COBRA insurance: July; August; and September. *Tr.* 333; *Cx.* 31; *Cx.* 32. Complainant is entitled to reimbursement in the amount of \$896.79 for medical insurance.

Complainant also lost 700 hours of flight time. *Tr.* 332. However, Complainant did not establish a quantifiable method for determining the value of lost flight time. Nor is it established that Complainant is entitled to compensation for lost flight time.

### III. Compensatory Damages for Mental Anguish

In order to recover compensatory damages, a complainant needs to show that he or she experienced mental pain and suffering and that the unlawful discharge caused the pain and suffering. *Crow v. Noble Roman's, Inc.*, 1995-CAA-00008 (Sec'y Feb. 26, 1996), *citing Blackburn v. Martin*, 982 F.2d 125, 131 (4th Cir. 1992) (ERA case). In *Crow*, the Complainant testified that he had worked for the Respondent and a predecessor company for almost ten years, and had no advance warning of his discharge for refusing to work on refrigeration equipment containing ozone-depleting compounds without a certification. There was evidence that the Complainant could not afford health insurance after the discharge and received food stamps for a period. He testified that he had very little money and "it was pretty hard." *Crow, supra*. The Secretary found that this testimony was sufficient to establish entitlement to \$10,000 in compensatory damages. *Id.*

Complainant testified that he was struggling to survive during the three months that he was unemployed. *Tr.* 337. Complainant testified that he could not get unemployment compensation since Respondent said that he abandoned his employment. *Tr.* 338. Complainant testified that he suffered seeing his wife cry and his two babies crying while he was struggling to find another job. *Tr.* 337. Complainant testified that he was pained because he lost his dream, his dream to be flying. *Tr.* 337. Complainant testified that he tried to get another job flying, but it was not possible. *Tr.* 337-38.

Complainant testified that during those months that he was unemployed his family lived off of the income he received from selling his and his wife's cars, and his family's savings of approximately \$1,000. *Tr.* 338. Complainant testified that he sold his car for \$1000, and his wife's car for \$2,000. *Tr.* 338.

Complainant's testimony is credible. Therefore, it is determined that Complainant is entitled to \$10,000 in compensatory damages for mental anguish and emotional distress. This figure is based

on the amount awarded by the Secretary in analogous cases. *See Crow, supra, citing Smith v. Littenberg*, 1992-ERA-00052, slip op. at 7 (Sec'y Sept. 9, 1995) (deciding that where complainant had secured a higher paying job, \$10,000 should be awarded for mental and emotional stress because of discharge); *DeFord v. Tennessee Valley Authority*, 1981-ERA-00001, slip op. at 4 (Sec'y Apr. 30, 1984) (awarding \$10,000 for emotional stress and damage to reputation because of demotion); *McCuiston v. Tennessee Valley Authority*, 1989-ERA-00006, slip op. at 21-22 (Sec'y Nov. 13, 1991) (awarding \$10,000 for emotional distress because of harassment, blacklisting, and discharge).

#### IV. Reinstatement

Complainant is seeking reinstatement. *Tr. 341*. Complainant has established that he was constructively discharged, and therefore, Complainant is entitled to immediate reinstatement. *Nathaniel, supra*; 29 C.F.R. §1979.109(b). Furthermore, Complainant is entitled to be reinstated with the conditions and privileges of employment he enjoyed before he was discriminated against by Respondent. 29 C.F.R. §1979.109(b). Therefore, Respondent shall reinstate Complainant with the pay and grade he maintained before he was discharged, and at the home-base he was originally assigned before the illegal transfer took place, i.e., Fajardo. Furthermore, Respondent shall purge Complainant's personnel file of all references to his engaging in protected activity and the discipline emanating therefrom. Accordingly,

### **ORDER**

IT IS HEREBY ORDERED that Respondent, Vieques Air Link:

1. Reinstate Complainant, in accordance with the conditions discussed in the opinion above;
2. Purge Complainant's personnel file of all references to his engaging in protected activity and the discipline emanating therefrom, as discussed in the opinion above, and such references shall not be used against Complainant in the event he applies for any future employment opportunities with Respondent, or in providing a reference concerning Complainant to any other potential employers;
3. Pay to Complainant back pay in the amount of \$5,457.38;
4. Pay to Complainant reimbursement for medical insurance he would not have had to pay for had he not been discriminated against, in the amount of \$896.79;
5. Pay to Complainant interest on back pay from the date the payments were due as wages until the actual date of payment. The rate of interest is payable at the rate established by section 6621 of the Internal Revenue Code, 26 U.S.C. § 6621;

6. Pay to Complainant compensatory damages in the amount of \$50,000 for the infliction of the emotional distress; and

7. Pay to Complainant all costs and expenses, including attorney fees, reasonably incurred by them in connection with this proceeding. Thirty days is hereby allowed to Complainant's counsel for submission of an application of attorney fees. A service sheet showing that service has been made upon Respondent must accompany the application. Respondent has ten days following receipt of such application within which to file any objections. It is requested that the petition for services and costs clearly state (1) counsel's hourly rate and supporting argument or documentation therefor, and (2) a clear itemization of the complexity and type of services rendered.

A

THOMAS M. BURKE

Associate Chief Administrative Law Judge

NOTICE OF APPEAL RIGHTS: This decision shall become the final order of the Secretary of Labor pursuant to 29 C.F.R. § 1979.110, unless a petition for review is timely filed with the Administrative Review Board ("Board"), US Department of Labor, Room S-4309, 200 Constitution Avenue, NW, Washington, D.C. 20210, and within 30 days of the filing of the petition, the ARB issues an order notifying the parties that the case has been accepted for review. The petition for review must specifically identify the findings, conclusions or orders to which exception is taken. Any exception not specifically urged ordinarily shall be deemed to have been waived by the parties. To be effective, a petition must be filed within ten (10) business days of the date of the decision of the administrative law judge. The date of the postmark, facsimile transmittal, or e-mail communication will be considered to be the date of filing; if the petition is filed in person, by hand-delivery or other means, the petition is considered filed upon receipt. The petition must be served on all parties and on the Chief Administrative Law Judge at the time it is filed with the Board. Copies of the petition for review and all briefs must be served on the Assistant Secretary, Occupational Safety and Health Administration, and on the Associate Solicitor, Division of Fair Labor Standards, U.S. Department of Labor, Washington, D.C. 20210. *See* 29 C.F.R. §§ 1979.109(c) and 1979.110(a) and (b), as found OSHA, Procedures for the Handling of Discrimination Complaints Under Section 519 of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century; Final Rule, 68 Fed. Reg. 14099 (Mar. 21, 2003).



